

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

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**IN THE
COURT OF APPEALS OF INDIANA**

TAMERA L. TEBBE,)
)
Appellant,)
)
vs.) No. 80A02-0601-CV-68
)
LEONARD J. TEBBE,)
)
Appellee.)

APPEAL FROM THE TIPTON CIRCUIT COURT
The Honorable Thomas R. Lett, Judge
Cause No. 80C01-0312-DR-351

June 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Tamera L. Tebbe (“Wife”) challenges the trial court’s order regarding the division of the marital estate. Leonard J. Tebbe (“Husband”) cross-appeals the trial court’s order for the payment of Wife’s attorney fees and litigation expenses.¹

We reverse and remand with instructions.

ISSUES

Wife’s Issues:

1. Whether the trial court erred in dividing the marital estate.
2. Whether the trial court erred in failing to value the parties’ assets according to the stipulation of the parties.

Husband’s Issue:

3. Whether the trial court abused its discretion when it ordered Husband to pay all of Wife’s attorney fees and litigation expenses.

FACTS

Wife and Husband were high school sweethearts at Tipton High School. Husband graduated in 1970 and began working on his family’s farm. After Wife graduated in 1971, she attended beauty college and graduated from it in May of 1972. Afterwards, she worked as a hair stylist at a local beauty salon. The parties married on August 19, 1972. Neither owned much property before the marriage. Wife entered the marriage with some personal property and a small savings account, and Husband, with some firearms, a Mustang vehicle and a gifted one-eighth interest in Tebbe Farm, a family farming enterprise. Subsequently, between 1974 and 1999, the original Tebbe Farm evolved into

¹ We heard oral argument in this matter on April 9, 2007, and thank appellate counsel for their able presentations.

several business entities, to-wit: Tebbe Land Partnership; Tebbe Land Partnership II; Tebbe Land Partnership III; TLP IV; TLP IV, Inc.; and A.G. Tebbe Farm, Inc., wherein ownership interest of Husband and his siblings was reflected in shares of A.G. Tebbe, Inc. that were placed into a voting trust.

Approximately two years after they were married, Husband and Wife moved into a home owned by Husband's parents; they lived at the residence for "all but two years" of their thirty-one year marriage. Tr. 29. The marriage produced six well-educated and/or successful children: Trenton, born September 10, 1974; Brian, born September 22, 1976; Sabrina, born May 17, 1979; Katrina, born April 19, 1982; Nathan, born October 14, 1983; and Clark, born October 14, 1985. Husband and Wife had agreed that commencing with their oldest child, when each child graduated from college, he or she would repay the parents for college expenses to enable the child next in line to attend college. Apparently, by the time of the final hearing, all of the children, with the exception of Clark, had either attended or had graduated from college.²

Just before Trenton was born, Wife stopped working at the beauty salon. After Trenton's birth, she worked "sporadically in the hair salon business," assisting local salon owners who needed her services. *Id.* at 34. Meanwhile, Husband was working on the Tebbe family farm. Both parties deposited their earnings into a joint account to be applied towards household bills. Wife did not work outside the home in the period

² Katrina, Nathan and Clark were not yet emancipated as of the date of separation. Apparently, Katrina had become emancipated, having graduated from college in the spring of 2003. By the time of the final hearing in October of 2005, Katrina had also obtained a post-graduate degree.

following the birth of the parties' second child, Brian; however, after their third child, Sabrina, was born, Wife resumed working occasionally at a hair salon, and began "taking in sewing." *Id.* at 36. Again, she deposited her earnings³ into the parties' joint account.

In the summer following Clark's birth, "Trenton, Brian, Husband and [Wife] derogued⁴ a few acres" for Pioneer Hi-Bred International, Inc.⁵ *Id.* at 41. She testified, "We started out with just a couple of acres the first year and for the next twelve years we just increased the acres. If nobody else in the family wanted any acres to do the kids and I and several of their friends would work through the summer deroguing corn." *Id.* Wife and the children "derogued for about thirteen years." *Id.* at 49. Wife put their wages into a savings account that she held jointly with Husband, and the funds were spent on household and children-related expenses. *Id.* at 49.

In addition to her deroguing efforts, Wife assisted on the Tebbe farm by

tak[ing] Husband lunch, supper or beer out in the field, assist[ing] in moving equipment in the fields, by pulling a grain head or a wagon, pick[ing] up an auger that was needed, [taking] fertilizer, water, and haul[ing] seed corn and soybeans to the fields,

³ Wife admits that her earnings were not substantial in comparison to Husband's, but testified that "[a]t least I felt like I was helping out with some of the bills." *Id.* at 37.

⁴ Wife testified that "deroguing" involves removing the unwanted corn so that the crop yield will "be uniform and all mature at the same time." *Id.* at 41.

⁵ Pioneer, a DuPont subsidiary headquartered in Johnston, Iowa, is a developer and supplier of agricultural products, services and technology. Under the parties' arrangement with Pioneer, the parties planted Pioneer's seed corn on the Tebbe farm, and Pioneer would pay the parties to "derogue and detassel [their] own corn." *Id.* at 41. Wife testified that "[I]t was something we decided to do to help out to give us a little extra money." *Id.* at 42. She added that had the parties not taken on the work, Pioneer "would have hired it out to someone else." *Id.* at 41, 42.

Wife's Br. 2; Tr. 62-63. Wife did "[w]hatever they needed. If I was available and usually I was because I stayed home." Tr. 64. Wife testified that during the marriage, she took no vacations as such, save helping a friend move back to Indiana from Arizona, and "tour[ing]" after driving the parties' son to camp in Huntsville, Alabama. *Id.* at 44.

When Clark started first-grade, Wife worked approximately four hours per day at Lincoln School. Over a period of seven years, she was responsible for doing "recess duty" and handling the students' lunch money at the school. In 1998, Wife left Lincoln School and secured employment at Marsh Supermarket. Wife also operated an embroidery business, using an embroidery machine and computer that Husband purchased for her. Again, she deposited her earnings into the parties' joint account.

Besides Wife's occasional employment outside the home, and her efforts on the Tebbe farm, she testified that she "still had a full-time job taking care of the family." *Id.* at 37. While Husband worked on the farm as the primary wage earner, Wife's main responsibility was to be primary caregiver to the parties' children. Wife cooked and cleaned, used cloth diapers, sewed clothing for Husband and the children, prepared meals, shuttled the children to and from their extra-curricular activities, and otherwise managed the household. Husband was also an involved parent. He "participated as much as he could in family activities and the children's sporting events," and "help[ed] [Wife] out from time to time." Husband's Br. 5; Tr. 39.

On July 19, 2002, Husband's mother died, leaving additional assets to be distributed between Husband and his siblings. Over a period of twenty-five years, from 1977 to 2002, Husband received, incrementally, by gift or inheritance five hundred thirty

shares of A.G. Tebbe Farm, Inc. Also, at his mother's death, Husband was the beneficiary of life insurance proceeds of "around two hundred forty thousand dollars." Tr. 168. Husband established National City Bank savings account #9119 ("account #9119") and deposited his inheritance and the life insurance proceeds therein.⁶ The account was titled jointly between Husband and the parties' son, Trenton. Husband testified that he intended to give the account to Trenton for the benefit of the parties' children in the event of Husband's death. At filing, the parties had four other bank accounts, in addition to account #9119: National City Checking #4612; National City Checking #4670; First Farmers Checking # 1819; and First Farmers Checking #0438.

During the marriage, specifically between 1995 and 2002, Husband purchased two hundred ninety shares of A.G. Tebbe Farm, Inc. for \$400,442.00 using income that he received from TLP IV, Inc.⁷ Combined with the additional five hundred thirty shares that were gifted or inherited from 1977 to 2002, Husband's holdings in A.G. Tebbe Farms, Inc. shares increased to a total of eight hundred twenty shares, valued at the time of separation at \$1,863,000.00.

When Wife filed her petition for dissolution of marriage on December 3, 2003, the marital estate was comprised of the following:

Tebbe Land Partnership. The partnership was established January 25, 1974, for the purpose of farming 174.36 acres which has been received by

⁶ After Wife filed her petition for dissolution on December 3, 2003, Husband deposited his post-filing wages into account #9119.

⁷ Husband testified that the two hundred ninety shares were purchased using "[t]he money we received as a result of TLP IV, Inc.," a corporation owned by Husband and his siblings, and which was formed in 1999. Tr. 172.

Husband and his siblings ‘by gift’ from their father prior to the date the Partnership Agreement was signed. The Deed by which Husband and his siblings took title to the property predated the date of the marriage. The farm was acquired by Husband’s father in May, 1968 at a cost of \$139,200.00 and was known as the John M. Tebbe Farm.⁸

Tebbe Land Partnership II. This partnership was formed May 7, 1981 by Husband’s siblings and their spouses. The purpose of the partnership is to acquire, own, rent, and/or lease farmland, and to farm the same. The Partnership Agreement, at Article XII, contains the right of first refusal in favor of the partners or partnership, in the event a partner desires during his lifetime to sell his interest.

Tebbe Land Partnership III. This partnership began operating in April, 1982, when land from Husband’s mother was distributed to Husband and his siblings.

TLP IV, Inc. This corporation was incorporated in 1999. The shares are owned by Husband and his siblings.

AG Tebbe Farms, Inc. This corporation was incorporated in 1974. The shares are owned by Husband and his siblings.

(Order 11-12). Husband held the interests in TLP IV, Inc. and A.G. Tebbe Farms, Inc. in voting trusts to preserve them and to provide a mode of transferring them to the parties’ children so that they could continue the family operation.

On December 23, 2003, the trial court approved an agreed preliminary order, pursuant to which Husband was financially responsible for the parties’ credit card balances, insurance, licenses and plates for the vehicles of Wife and the parties’ daughter, and the college-related and uninsured expenses for the parties’ children. The trial court ordered these expenses “paid by husband from the funds in the parties’ joint checking account and, if insufficient, from the funds in [account #9119]. The checking and savings

⁸ Husband owned a one-eighth interest, approximately 21.8 acres, at the time of the parties’ marriage.

accounts had stipulated balances of \$2,815 and \$247,395, [respectively]⁹” Husband’s Br. 4; citation omitted.

After the agreed preliminary order was entered, the parties reached agreements regarding preliminary issues but were unsuccessful in their attempt at mediation. Prior to the final hearing on October 14, 2005, and pursuant to Indiana Trial Rule 52(a), Wife filed a motion for findings and conclusions. The parties proceeded to final hearing on October 18, 2005. Thereafter, they submitted their proposed findings of fact, conclusions of law and decrees to the trial court.

At the time of final hearing, Wife was working four part-time jobs¹⁰ and earning an annual salary of \$26,000.00. Husband was earning approximately \$100,000.00 each year on the family farm, and had consistently done so for a number of years. Wife proposed an equal division of all property within the marital estate, and sought to include the filing value of depleted account #9119 (\$247,335.00), as well as the value of the parties’ other closed and depleted accounts, within the marital division “without regard to the source of the money used to fund [the] accounts.” Order 24. She also sought to divide equally the interests in Tebbe Land Partnership, Tebbe Land Partnership II, Tebbe

⁹ In their stipulation, the parties attributed the following values to their accounts: National City Savings #9119 (\$247,335.00); National City Checking #4612 (\$10,950.00); First Farmers Checking #1819 (\$1,030.00); First Farmers Checking #0438 (\$123.00); and National City Checking #4670 (\$2,815.00). By the time of final hearing, accounts #9119 and #4612 were “depleted,” #0438 and #4670 were “closed,” and # 1819 retained its full stipulated value of \$1,030.00. Order 21.

¹⁰ Wife was grading papers at the Elwood Alternative School, working as a teacher’s assistant in GED classes, running her embroidery business and working at a Marsh Supermarket.

Land Partnership III, TLP IV, Inc., and AG Tebbe Farms, Inc., regardless of the source of the assets or their increased value during the marriage.

The parties also submitted their “stipulation as to value of certain assets and liabilities of the marital estate on dates certain.” Wife’s App. 54-59. Under the stipulation, they agreed to valuations for certain assets and liabilities while also expressly

reserving the right to present evidence on the valuation, treatment and distribution of all assets/liabilities including, but not limited to “gifted” and “inherited” assets; the composition of the marital estate; how each such asset/liability should be treated in the ‘equitable division’ of the marital estate; the percentage division of the marital estate’ and all other matters which could otherwise be brought before the Court, excepting only evidence to vary the stated value or liability amounts of each set forth below on the “DATE” of the “STIPULATED VALUE”

Id. at 54-55. The parties’ itemization of the marital estate (below) was divided into the following categories: Personal Property; Vehicles; Farm Equipment; Bank Accounts; Securities/Investment Accounts; Retirement Accounts; Life Insurance; and Business Interests.

PARTIES’ STIPULATED VALUES

Description/Account No.	DATE	STIPULATED VALUE
PERSONAL PROPERTY		
Property in Wife's Possession	At/Near 12/2/03	Divided "in kind"
Property in Husband's Possession	At/Near 12/2/03	Divided "in kind"
Embroidery/Sewing Equipment, Computer, Patterns/Designs	At/Near 12/2/03	18,500
Wife's Jewelry (15 necklaces @ 500/ea; 3 necklaces (@ 1,000/ea; ring 1.500)	At/Near 12/2/03	12,000
Husband's firearms		value in dispute
VEHICLES		
2002 Mercury Sable - traded by W post filing	At/Near 12/2/03	8,689
2003 Harley Davidson Heritage	At/Near 12/2/03	14,000
Mustang (owned by Husband prior to marriage)		value in dispute
FARM EQUIPMENT		
1998 Unverferth Double Roller Harrow	At/Near 12/2/03	6,500

2003 United 24 Foot Trailer	At/Near 12/2/03	1,500
2-2002 Case IH 1020 Grain Heads	At/Near 12/2/03	24,000
2001 Case Corn Head (owned jointly w/ Robert Tebbe)	At/Near 12/2/03	2,000
BANK ACCOUNTS		
National City Checking #4612 (J w/ Trenton)	12/04/03	10,950
National City Checking #4670 (J)	12/26/03	2,815
First Farmers Checking #1819 (W)	12/03/03	1,030
First Farmers Checking #0438 (J)	12/16/03	123
National City Savings #9119 (H w/ Trenton)	12/04/03	247,335
First Farmers CD #2715 (withdrawn by Wife)	11/06/03	10,952
SECURITIES / INVESTMENT ACCOUNTS		
Edward Jones #9929 - Nokia stock=1,700, Amerus stock=979	12/28/03	2,679
Phoenix Oakhurst Balanced Fund #3293	12/02/03	6,364
RETIREMENT ACCOUNTS		
Mutual Funds Held Outside Edward Jones (#9929):		
Putnam Voyager Fund Class A - Roth IRA #6203 (H)	12/31/03	8,161
Putnam Growth & Income Class A - IRA #6890 (W)	12/31/03	632
Putnam Voyager Fund Class A - Roth IRA #5226 (W)	12/31/03	7,708
Phoenix IRA #3035 (H)	12/02/03	2,985
Phoenix IRA #3031 (H)	12/02/03	5,237
Phoenix IRA #3027 (W)	12/02/03	4,151
Phoenix IRA #3023 (W)	12/02/03	3,663
American Funds IRA/SEP #5243 (I-I)	12/02/03	107,925
<i>Earnings/losses, if any, allocable to the same from date of filing to date of division, are includable in the marital estate; post filing contributions and earnings/losses on post filing contributions are not includable in marital estate</i>		-
Edward Jones Simple IRA #6814 (H-AG Tebbe Farms, Inc.)	11/28/03	49,170
<i>Earnings/losses, if any, allocable to the same from date of filing to date of division, are includable in the marital estate; post filing contributions and earnings/losses on post filing contributions are not includable in marital estate</i>		

Description/Account No.	DATE	STIPULATED VALUE
Edward Jones TLP IV SEP #0816 (H) <i>Earnings/losses, if any, allocable to the same from date of filing to date of division, are includable in the marital estate; post filing contributions and earnings/losses on post filing contributions are not includable in marital estate</i>	11/28/01	55,140
American Century IRA #8918 (H)	12/02/03	40,236
American Century IRA #9171 (H)	12/02/03	66,025
Marsh 401K (W)	01/01/04	4,659
LIFE INSURANCE		
Indianapolis Life Policy #5528 Owner/Insured: H; benef: Trenton: face amt: 100,000	12/10/03	4,834
Indianapolis Life Policy #2738 Owner/Insured: H; benef: Trenton; face amt: 25,000	12/10/03	13,805
Indianapolis Life Policy #4885 Owner/insured: H; benef: Trenton: face amt: 10,000	12/10/03	4,560

Indianapolis Life Policy #2256 Owner/insured: H; benef: Trenton; face amt: 25,000	12/10/03	10,075
Indianapolis Life Policy #8324 Owner/insured: H; benef: Trenton; face amt: 10,000	12/10/03	2,360
Indianapolis Life Policy #0639. owner/insured: H; benef: Trenton; face amt: 15,000	12/10/03	7,755
Indianapolis Life Policy #7841 Owner/insured: H; benef: Trenton; face amt: 210,000	12/08/03	35,494
Indianapolis Life Policy #0920 Owner/insured: H; benef: Trenton; face amt: 10,000	12/14/03	3,530
Indianapolis Life Policy #7837 (W) Owner/insured: W; benef: kids; face amount: 150,000	05/16/04	18,547
Indianapolis Life Policy #4309 (W) Owner/insured: W; benef: kids; face amount: 10,000	12/03/03	3,917
BUSINESS INTERESTS		
Tebbe Land Partnership (H-16.67% interest)	12/02/03	85,000
Tebbe Land Partnership II (J-16.67% interest)	12/02/03	26,700
Tebbe Land Partnership III	12/02/03	62,000
TLP IV, Inc.	12/02/03	32,500
A.G. Tebbe Farms. Inc. (820 shares held in Voting Trust, source of acquisition and value at acquisition of said 820 shares)	12/02/03	1,863,000
Source of Acquisition and Value at Acquisition of said 820 Shares: Husband's beneficial interest in Voting Trust holding 290 shares of A.G. Tebbe Farms purchased as follows: 50 shares on 12/29/95 at 1,078.22 per share 50 shares on 12/31/96 at 1,163.67 per share 50 shares on 12/17/97 at 1,258.63 per share 40 shares on 12/30/98 at 1,308.97 per share 71 shares on 11/29/01 at 1,620.41 per share 29 shares on 12/31/02 at 2,000.27 per share Total: 290 shares purchased for 400,441.74		400,442
Description/Account No.	DATE	STIPULATED VALUE

<p>Husband's beneficial interest in Voting Trust holding 530 shares of A.G. Tebbe Farms inherited/gifted as follows:</p> <p>6 shares on 12/23/77 at 1,000 per share 6 shares on 1/3/78 at 1,000 per share 6 shares on 12/17/79 at 886 per share 6 shares on 1/2/80 at 886 per share 5 shares on 12/28/81 at 1,200 per share 8 shares on 1/15/82 at 1,200 per share 8 shares on 1/15/82 at 1,200 per share 10 shares on 12/30/83 at 945 per share 10 shares on 12/30/83 at 945 per share 10 shares on 1/3/84 at 945 per share 10 shares on 1/3/84 at 945 per share 13 shares on 12/23/85 at 742 per share 13 shares on 12/23/85 at 742 per share 13 shares on 1/2/86 at 742 per share 13 shares on 1/2/86 at 742 per share 11 shares on 12/23/87 at 911.32 per share 11 shares on 12/23/87 at 911.32 per share 11 shares on 1/2/88 at 911.32 per share 11 shares on 1/2/88 at 911.32 per share 9 shares on 12/22/89 at 1,006.39 per share 9 shares on 12/22/89 at 1,006.39 per share 9 shares on 1/1/90 at 1,006.39 per share 9 shares on 1/1/90 at 1,006.39 per share 8 shares on 12/31/91 at 1,146.14 per share 8 shares on 12/31/91 at 1,146.14 per share 8 shares on 1/2/92 at 1,146.14 per share 8 shares on 1/2/92 at 1,146.14 per share 72 shares on 12/31/92 at 957.95 per share 10 shares on 12/31/92 at 1,037.38 per share 10 shares on 1/3/94 at 1,037.38 per share 128 shares on 5/16/95 at 1,080 per share 9 shares on 12/29/95 at 1,078.22 per share 9 shares on 12/31/96 at 1,163.67 per share 9 shares on 1/2/97 at 1,163.67 per share 8 shares on 12/30/98 at 1,308.97 per share 8 shares on 3/30/99 at 1,308.97 per share 6 shares on 12/27/00 at 1,583.69 per share 6 shares on 1/2/01 at 1,583.69 per share 6 shares on 1/10/02 at 1,695.22 per share</p> <p>Total: 530 shares gifted/inherited for 545,949.76 (Stipulated Value)</p>		545,950
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Description/Account No.	DATE	STIPULATED VALUE
Increase in value of 820 shares purchased or gifted/inherited during marriage computed as follows: 290 Shares Purchased by Husband During Marriage Purchase price of shares = 400,442 Value at 12/2/03 per Riddle (2,272/share) = 258,438 Increase During Marriage = 258,438 530 Shares Gifted/Inherited to Husband Purchase price of shares = 545,950 Value at 12/2/03 per Riddle (2,272/share) = 1,204,160 Increase During Marriage = 658,210	12/02/03	916,648
Pre-filing loans paid off by Husband post filing total \$27,943	Paid off in 2003 Paid off in 2004	(23.193) (4.750)
CREDIT DUE HUSBAND		
Per Agreed Entry (paid from National City Savings #9119)		30,000
Maintenance to Wife (paid from National City Savings #9119): 750 from Feb 2004-Aug 2004 500 from Mar 2005-Oct 2005 500 from Nov 2005 to date of Decree	1/2004-2/2005 3/2005-10/2005 11/2005 to date of last pre-Decree payment	5,250 4,000 @ 500 per month
LOANS PAID WITH POST FILING INCOME BY HUSBAND		
Loan paid off by Husband on Indianapolis Life Policy # 2738	02/25/04	6,916
Loan paid off by Husband on Indianapolis Life Policy #2256	02/25/04	2,607
Loan paid off by Husband on Indianapolis Life Policy #0639	02/25/04	2,947

8. The parties further stipulate and agree that the following assets are held for the benefit of the children and are not a part of the marital estate:

CHILDREN'S ACCOUNTS:		
Mutual Funds Held Outside Edward Jones (#9929):		
Cust Roth IRA - Hartford Stock Fund CL A (H-Nathan)	12/31/03	6,639
Cust Roth IRA - Hartford Stock Fund CL A (H-Clark)	12/31/03	2,574
Coverdell ESA-Putnam Investors Fund CL A (W-Nathan)	12/31/03	928
Coverdell ESA-Putnam Investors Fund CL A (W-Katrina)	12/31/03	928
Coverdell ESA-Putnam Investors Fund CL A (W-Clark)	12/31/03	2,549
Indianapolis Life Policy #0373 – Nathan insured	12/03/03	1,029
Indianapolis Life Policy #3581 – Clark insured	12/03/03	866
Indianapolis Life Policy #3580 – Katrina insured	12/03/03	1,091
Indianapolis Life Policy #7662 – Katrina insured	12/03/03	980
2001 Mercury Sable (Katrina drove – traded post filing)		

(Wife's App. 54 -58).

The trial court reviewed and approved the parties' stipulation and took the matter under advisement. On January 6, 2006, the trial court issued its findings of fact and conclusions of law and judgment, setting out its division of the marital estate.

The trial court found the stipulated marital estate, in relevant part, to be as follows:

TRIAL COURT'S FINDINGS

Description/Account No.	Stipulated Value At/Near DOF
<u>PERSONAL PROPERTY</u>	
Property in Wife's Possession	
Property in Husband's Possession	
Embroidery/Sewing Equipment, Computer, Patterns/Design	18,500
Wife's Jewelry	12,000
Husband's Firearms (majority owned prior to marriage)	Value in dispute
<u>VEHICLES</u>	
2002 Mercury Sable - traded by W post filing	8,689
2003 Harley Davidson Heritage	14,000
Mustang (owned by Husband prior to marriage)	Value in dispute
<u>FARM EQUIPMENT</u>	
1998 Unverferth Double Roller Harrow	6,500
2003 United 24 Foot Trailer	1,500
2-2002 Case IH 1020 Grain Heads	24,000
2001 Case Corn Head (owned jointly w/ Robert Tebbe)	2,000
<u>BANK ACCOUNT</u>	
National City Checking #4612 (J w/ Trenton) at 12/4/03	10,950
National City Checking #4670 (J) at 12/26/03	2,815
First Farmers Checking #1819 (W)	1,030
First Farmers Checking #0438 (J)	123
National City Savings #9119 (H w/ Trenton) at 12/4/03 includes life ins proceeds from H's mother's estate of 172,527	247,335
First Farmers CD (closed 11/2003)	10,952
<u>SECURITIES/INVESTMENT ACCOUNTS</u>	
Edward Jones #9929 - Nokia stock = 1,700; Amerus = 979	2,679
Phoenix Oakhurst Balanced Fund #3293	6,364
<u>RETIREMENT ACCOUNTS</u>	
Mutual Funds Held Outside Edward Jones (#9929):	
Putnam Voyager Fund Class A - Roth IRA #6203 (H)	8,161

Putnam Growth & Income Class A - IRA #6890 (W)	632
Putnam Voyager Fund Class A - Roth IRA #5226 (W)	7,708
Phoenix IRA #3035 (H)	2,985
Phoenix IRA #3031 (H)	5,237
Phoenix IRA #3027 (W)	4,151
Phoenix IRA #3023 (W)	3,663
American Funds IRA/SEP #5243 (H) <i>Earnings/losses, if any, allocable to the same from date of filing to date of division, are includable in the marital estate;</i>	107,925
<i>post filing contributions and earnings/losses on post filing contributions are not includable in marital estate</i>	
Edward Jones Simple IRA #6814 (H) <i>Earnings/losses, if any, allocable to the same from date of filing to date of division, are includable in the marital estate;</i>	49,170
<i>post filing contributions and earnings/losses on post filing contributions are not includable in marital estate</i>	
Edward Jones TLP IV SEP #0816 (H) <i>Earnings/losses, if any, allocable to the same from date of filing to date of division, are includable in the marital estate;</i>	55,140
<i>post filing contributions and earnings/losses on post filing contributions are not includable in marital estate</i>	
American Century IRA #8918 (H)	40,236
American Century IRA #9171 (H)	66,025
Marsh 401K (W)	4,659
LIFE INSURANCE	
Indianapolis Life Policy #5528 Owner/Insured: H; benef: Trenton; face amt: 100,000	4,834
Indianapolis Life Policy #2738 Owner/Insured: H; benef: Trenton; face amt: 25,000	13,805
Indianapolis Life Policy #4885 Owner/insured: H; benef: Trenton; face amt: 10,000	4,506
Indianapolis Life Policy #2256 Owner/insured: H; benef: Trenton; face amt: 25,000	10,075
Indianapolis Life #8324 Owner/insured: H; benef: Trenton; face amt: 10,000	2,360
Indianapolis Life Policy #0639 Owner/insured: H; benef: Trenton; face amt: 15,000	7,775
Indianapolis Life Policy #7841 Owner/insured: H; benef: Trenton; face amt: 210,000	35,494
Indianapolis Life Policy 0920 Owner/insured: H; benef: Trenton; face amt: 10,000	3,530
Indianapolis Life Policy #7837 (W) owner/insured: W; benef: kids; face amount: 150,000	18,547
Indianapolis Life Policy #4309 (W) owner/insured: W; benef kids: face amount: 10.000	3,917

FAMILY BUSINESS INTERESTS	
(Tebbe Land Partnership II (J - 16.67% interest)	26,700
TLP IV, Inc. (H - 1,000 shares in Voting Trust)	32,500

AG Tebbe Farms, Inc. (820 shares held in Voting Trust) at 12/2/03	1,863,000
Pre-filing loans paid off by Husband post filing of (27,943):	
Paid off in 2003	(23,193)
Paid off in 2004	(4,750)

The Court finds that the stipulated source of acquisition and stipulated value at acquisition of said 820 shares of AG Tebbe Farms, Inc. is as follows:

(1) Husband's Beneficial interest in Voting Trust holding 290 shares of A.G. Tebbe Farms purchased by Husband	400,442
(2) Husband's beneficial interest in Voting Trust holding 530 shares of A.G. Tebbe Farms inherited/gifted to Husband	545,950

The Court finds the stipulated increase of value of the 820 shares of AG Tebbe, Inc. purchased by Husband or gifted/inherited during marriage is as follows:

290 Shares Purchased by Husband During Marriage	258,438
530 Shares Gifted/Inherited by Husband	658,210

The Court finds that, as stipulated, Husband received the following by way of inheritance or gifts during the marriage:

530 Shares of A.G. Tebbe Farms as stated above	
Tebbe Land Partnership (H - 16.67% interest)	85,000
Tebbe Land Partnership III (60 acres, H - 1/8 interest) (land transferred from Estella M. Powell-final distribution 1982)	62,000
Cash from Estate of Estelle M. Powell (H's grandmother)	1,277

The Court cannot exclude from the marital estate the property brought into the marriage or acquired by gifts and/or inheritance, nor can such property be placed beyond the scope of this Court's authority for division. The Court has the ability to set over to Husband that property if it finds the basis for doing so, as the terms of the division of the marital estate remain in the discretion of this Court. In Re: Marriage of Dreflak, (Ind. App. 1970), 393 NE2d 773.

Pursuant to the Stipulation, Husband is entitled to the following credits:

CREDIT DUE HUSBAND:	
Per Agreed Entry (paid from account #9119)	30,000

Maintenance to Wife (paid from account #9119): 750 from Feb 2004-Aug 2004	5,250
500 from Mar 2005-Oct 2005 500 from Nov 2005 to date of Decree	4,000 ?
TOTAL	39,250

The Stipulation was that Husband paid certain pre-filing debts as follows:

LOANS PAID WITH POST FILING INCOME BY HUSBAND:	
Loan paid off on Indianapolis Life Policy #2738	6,916
Loan paid off on Indianapolis Life Policy #2256	2,607
Loan paid off on Indianapolis Life Policy #0639	2,947
TOTAL	12,470

Order 13-16.

The trial court then decided against an equal distribution, finding instead that “a deviation in favor of Husband is justified,” and set out its rationale as follows:

TRIAL COURT’S ORDER

The Court finds that it should deviate from the presumption that an equal division of the marital estate is just and reasonable. In reaching such finding, the Court has considered the following:

- a. The respective earning abilities of Husband and Wife as related to: (i) a final division of the property; and (ii) a final determination of the property rights of the parties.
- b. The contribution of Husband and Wife to the acquisition of property regardless of whether the contribution was income producing.
- c. Wife’s contributions as a homemaker are entitled to equal weight with Husband’s contributions as a wage earner.
- d. The fact that the increased value of the family farming interests is largely the result of market force increases.
- e. The fact that at the time of the disposition of property, the parties’ economic circumstances will each be secure.
- f. The fact that with exception of the joint interest in Tebbe Land Partnership II; (and the farm interests held in voting trusts), the family farming interest [sic] were held in Husband’s individual name alone, were never commingled with the marital interest, are not liquid and do not produce any substantial income.

g. The conduct of the parties during the marriage as related to the disposition or dissipation of their property. The Court finds such conduct is not a relevant factor in this case in the division of the marital estate.

* * *

The Court finds a deviation from the presumption than an equal division of the marital estate is “just and reasonable” not only because of the factors set forth in a-g above and the gifted/inherited nature of the family farm interests, but also because the parties’ lifestyle and ability to educate their children was made possible, almost entirely by the farm interests; the significant contributions Husband made to the marriage were made possible by the ability to participate in the revenues of family farm interest; the acquisition of the farm interests which were not inherited was made possible by revenues generated by the interests which were in fact gifted or inherited; the fact that according to the testimony of Husband’s brother, George, the parties’ [sic] only “had money” in only one of the farm interests; and, that the increase in value of the 290 shares of AG Tebbe Farms Inc. purchased over the marriage is divided between the parties in this Court’s judgment.

In reaching its’ [sic] judgment, the Court has weighed Wife’s earning ability and economic circumstances at the time the disposition of property is to become effective against the Husband’s earning ability and the source of acquisition of the farm interests. The Court has also considered the length of the marriage, the age of the parties, and their fiscal behavior during the marriage and period of separation (as it related to the support of their unemancipated children). The Court has also weighed the proximity of Husband’s mothers’ [sic] death (and the date of distribution of the assets from his Mother’s estate) to the date of filing by Wife and the fact that [account] #9119, which Wife seeks to have divided at the date of filing value, was the result of Husband’s inheritance and the intended gift of Husband to [his son] Trenton of the balance in the event of Husband’s death.

The Court has further considered that Husband expended substantial amounts of the inheritance from his mother to support the parties’ children, pay their education and costs, and pay fees to Wife’s expert and counsel.

The Court finds all the factors set forth in the preceding paragraphs justify an unequal division of the marital estate in favor of Husband.

Based upon the above, the Court finds that Husband, by a preponderance of evidence, has sustained his burden of establishing a deviation in his favor should occur from the rebuttable presumption of an equal division of the assets.

Order 19-20.

For purposes of disposition, the trial court valued the marital estate at \$1,669,965.00.¹¹ The trial court then deemed the following assets to belong entirely to Husband, and deducted them from the \$1,669,965.00: (1) the entire increase in value of the 530 inherited shares in the amount of \$658,260.00; (2) the full value of Husband's share of Tebbe Land Partnership in the amount of \$85,000.00; (3) the full value of Husband's share of Tebbe Land Partnership III in the amount of \$62,000; (4) Husband's inheritance in 1982 from his grandmother's estate in the amount of \$1,277; (5) credit for Husband's pre-distribution payment to Wife in the amount of \$30,000; (6) credit for Husband's maintenance payments to Wife in the amount of \$9,250.00.¹²

After deducting these sums and for the purpose of disposition, the trial court arrived at a net value of \$818,674.00, which it then divided between Husband and Wife, awarding \$422,409.00 (52%) to Husband and \$396,265 (48%) to Wife. The trial court also ordered Husband to pay Wife's attorney fees in the amount of \$38,108.53 and to reimburse her litigation expenses in the amount of \$5,200.00.

¹¹ The parties' stipulated value of the marital estate was \$2,899,206.00 – a difference of \$1,229,241.00 that was excluded by the trial court.

¹² This figure does not include maintenance paid from November 2005 through the date of the decree, January 6, 2006.

Wife now appeals from the trial court's division of the marital estate, and Husband cross-appeals from the trial court's award of attorney fees and litigation expenses.

DECISION

The division of marital assets lies within the sound discretion of the trial court, and we will reverse only for an abuse of that discretion. *J.M. v. J. M.*, 844 N.E.2d 590, 602 (Ind. Ct. App. 2006). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, including the reasonable inferences to be drawn therefrom. *Daugherty v. Daugherty*, 816 N.E. 2d 1180, 1187 (Ind. Ct. App. 2004).

When we review a challenge to the trial court's division of marital property, we may not reweigh the evidence or assess the credibility of witnesses, and we will consider only the evidence most favorable to the trial court's disposition of marital property. *Woods v. Woods*, 788 N.E.2d 897, 900 (Ind. Ct. App. 2003). We do not reweigh the evidence, but consider only the evidence favorable to the trial court's judgment. *Clark v. Crowe*, 778 N.E.2d 835, 839-40 (Ind. Ct. App. 2002).

Because the trial court here issued findings of fact and conclusions thereon, we must apply a two-tiered standard of review: first, we determine whether the evidence supports the findings, and second, whether the findings support the conclusion and judgment. *Freese v. Burns*, 771 N.E.2d 697, 700-01 (Ind. Ct. App. 2002). We will reverse a judgment only when it is shown to be clearly erroneous, meaning that it is unsupported by the findings of fact and conclusions entered on the findings. *Scoleri v. Scoleri*, 766 N.E.2d 1211, 1215 (Ind. Ct. App. 2002). Findings of fact are clearly

erroneous if the record lacks probative evidence or reasonable inferences from the evidence to support them. *Id.* A judgment is clearly erroneous when it applies the wrong legal standard to properly found facts. *Cox v. Cox*, 833 N.E.2d 1077, 1080 (Ind. Ct. App. 2005).

A. Division of Marital Property

Wife contends that the trial court abused its discretion when it deviated from the presumptive equal division. She asserts that the trial court erred when it systematically excluded certain property that Husband acquired during the marriage from the marital estate. Also, Wife challenges the trial court's refusal to adhere to the parties' asset value stipulation in its division of the marital estate.

1. Deviation from Presumptive Equitable Division

All property, whether acquired before or during the marriage is included in the marital estate for property division. *Larkins v. Larkins*, 685 N.E.2d 88, 91 (Ind. Ct. App. 1997). Trial courts must divide marital property in a dissolution action in a just and reasonable manner. Ind. Code § 31-15-7-4. An equal division of marital property is presumed to be just and equitable. I. C. § 31-15-7-5. Trial courts may deviate from an equal distribution, provided that they consider the statutory factors delineated in Indiana Code section 31-15-7-5.

Accordingly, the presumptive equitable division may be rebutted by a party who presents relevant evidence of the following: (1) the income producing or non-income producing contributions of the respective spouses; (2) the extent to which property was acquired by each spouse either before the marriage or through inheritance or gift; (3) the

economic circumstances of each spouse at the time of disposition of the property; (4) the parties' conduct during the marriage with regard to the disposition or dissipation of their property; and (5) the parties' respective earning abilities. *Wallace v. Wallace*, 714 N.E.2d 774, 779-80 (Ind. Ct. App. 1999). The trial court must consider all of the factors set out in the statute. *Id.*

We begin with the strong presumption that the trial court considered and complied with the applicable statute, which must be overcome by the party challenging the trial court's division of marital property. *Hatten v. Hatten*, 825 N.E.2d 791, 794 (Ind. Ct. App. 2005).

In its discussion of the applicable statutory factors herein, the trial court held,

In reaching such finding [that deviation is warranted], the Court has considered the following:

- a. The respective earning abilities of Husband and Wife as related to: (i) a final division of the property; and (ii) a final determination of the property rights of the parties.
- b. The contribution of Husband and Wife to the acquisition of property regardless of whether the contribution was income producing.
- c. Wife's contributions as a homemaker are entitled to equal weight with Husband's contributions as a wage earner.
- d. The fact that the increased value of the family farming interests is largely the result of market force increases.
- e. The fact that at the time of the disposition of property, the parties' economic circumstances will each be secure.
- f. The fact that with exception of the joint interest in Tebbe Land Partnership II; (and the farm interests held in voting trusts), the family farming interest [sic] were held in Husband's individual name alone, were never commingled with the marital interest, are not liquid and do not produce any substantial income.
- g. The conduct of the parties during the marriage as related to the disposition or dissipation of their property. The Court finds such

conduct is not a relevant factor¹³ in this case in the division of the marital estate.

...

52. The Court finds a deviation from the presumption of an equal division of the marital estate is ‘just and reasonable’ **not only** because of the [I. C. 31-15-7-5] factors . . . above and the gifted/inherited nature of the family farm interests, **but also because** the parties’ lifestyle and ability to educate their children was made possible, almost entirely by the farm interests; the significant contributions Husband made to the marriage were made possible by the ability to participate in the revenues of family farm interest; the acquisition of the farm interests which were not inherited was made possible by revenues generated by the interests which were in fact gifted or inherited; the fact that according to the testimony of Husband’s brother, George, the parties’ [sic] only “had money” in only one of the farm interest; and, that the increase in value of the 290 shares of AG Tebbe Farms Inc. purchased over the marriage is divided between the parties in this Court’s judgment.

53. In reaching its’ [sic] judgment, the Court has weighed Wife’s earning ability and economic circumstances at the time the disposition of property is to become effective against the Husband’s earning ability and the source of acquisition of the farm interests. The Court has also considered the length of the marriage, the age of the parties, and their fiscal behavior during the marriage and period of separation (as it related to the support of their unemancipated children). The Court has also weighed the proximity of Husband’s mothers’ [sic] death (and the date of distribution of the assets from his Mother’s estate) to the date of filing by Wife and the fact that the National City Savings Account #9119, which Wife seeks to have divided at the date of filing value, was the result of Husband’s inheritance and the intended gift of Husband to [his son] Trenton of the balance in the event of Husband’s death.

Order 19-20 (emphasis added).

Because the factors are statutory, we proceed by examining each as applied to the evidence and facts here. The first statutory factor involves the income producing or non-

¹³ We read this finding as one indicating that the trial court found no inappropriate disposition or dissipation of marital property by either party.

income producing contributions of each spouse. The evidence revealed that during the marriage, Husband was the primary wage earner in the parties' household, earning at least \$100,000 a year consistently for several years before the final hearing.¹⁴ Wife, on the other hand, worked outside the home at various part-time jobs, including performing some farming-related tasks; however, her energies were primarily devoted to raising the parties' six children (separated in age by approximately two to two and a half years) and maintaining the family's household, allowing Husband to work extended hours on the family farm and, thereby, to ensure its success. Using marital funds, Husband and Wife were able to purchase two hundred ninety additional shares of A.G. Tebbe Farms Inc. at a cost of \$440,442.00. However, but for their joint efforts, the parties could hardly have been so financially successful. Thus, we agree with the trial court's finding that "Wife's contributions as a homemaker are entitled to equal weight with Husband's contributions as a wage earner." *Id.* at 19.

The second statutory factor involves the extent to which property was acquired by each party either before the marriage, or through inheritance or gift. Neither party brought significant assets into the marriage. Husband entered into the marriage with a one-eighth ownership interest in Tebbe Farm (approximately 21.8 acres) and some personal property. Wife, on the other hand, brought into the marriage some personal property and a small bank account. As previously noted in FACTS, from 1977 to 2002, Husband received, incrementally, by gift or inheritance five hundred thirty shares of A.

¹⁴ Husband's salary varied based on the crop yield and the favorability of the weather; however, in the years preceding the parties' separation, Husband's income had consistently exceeded \$100,000.00 per year.

G. Tebbe Farms, Inc. In addition, he was the beneficiary of “around two hundred and forty-seven thousand [dollars]” in life insurance proceeds from his mother’s death. Tr. 168. The parties’ marital estate had a stipulated value of \$2,899,206.00, and the bulk was comprised primarily of A.G. Tebbe Farms, Inc.-related assets. We agree with the trial court that “[e]conomically, the acquisition of the marital estate was almost exclusively by means of inherited or gifted property from Husband’s family.” Order 11.

The third statutory factor we consider involves the economic circumstances of each spouse at the time of the disposition of the marital estate. At the time of the final hearing, Wife was earning approximately \$500.00 a week working at four jobs – grading papers at the Elwood Alternative School, working as a teacher’s assistant, running her embroidery business and working at a Marsh Supermarket. She testified, “I just don’t make enough to pay all of my bills.” Tr. 70. Her prospects for higher pay were tenuous given her high school education and her beauty school certification, earned almost thirty years earlier.

In contrast, for several years, Husband has consistently earned at least \$100,000 a year from the family farm. Evidence of Husband’s spending¹⁵ during the pendency of the

¹⁵ We are concerned by the extent to which Husband unilaterally decided how post-separation marital monies were spent. The record indicates that Husband made the following unilateral decisions: (1) forgiving the parties’ children’s obligation to repay their college tuition costs to their parents, despite the parties’ prior understanding to the contrary; (2) contributing \$3,000.00 to each of their six children’s IRA accounts, when five of the children were adults, expending a total of \$18,000.00; and (3) establishing a trust over which Husband retained control, whereby Husband could “start giving . . . shares to [the parties’] children” at his discretion. Tr. 217. We do not find that Husband’s decisions amount to waste or dissipation of the marital estate, but they do give us pause that such conduct reduced the amount of marital funds that could be made available to provide for Wife’s welfare. *See Chase v. Chase*, 690 N.E.2d 753, 757 (Ind. Ct. App. 1998) (holding that money spent for a child’s education, transportation and housing does not usually constitute a waste or use of marital assets).

dissolution action supports the trial court's finding that Husband's economic circumstances were secure at the time of the disposition of property, but it certainly calls into question whether Wife's status was similarly assured. As further noted, during this separation period, Husband (1) traveled to Yellowstone National Park to go "snowmobiling" (*Id.* at 215); (2) traveled twice to Sturgis, South Dakota¹⁶ on his motorcycle; (3) purchased a 2004 used trailer; (4) gave the parties' son, Nathan, \$32,463.42 to purchase a new car; (5) gave the parties' daughter, Katrina, \$15,391.50 to purchase a new car; and (6) took the parties' six children and the parties' grandchildren to Florida for Christmas. *Id.* at 215-16.

Despite Husband's testimony at the final hearing that only \$3,000.00 remained in account #9119,¹⁷ and that he had no liquid assets other than his retirement funds, the fact remains that for several years, he had earned at least \$100,000 per year, while Wife was struggling to earn approximately \$26,000 per year.¹⁸ The facts and the evidence simply

At the final hearing, Husband testified that because most of the monies that he spent were life insurance proceeds from his mother's death, he "d[id]n't consider that part of the marital estate . . ." *Id.* at 221. The trial court apparently disagreed, as noted in its finding number thirty-four, in which the court found that Husband had "expended approximately \$258,000 in marital assets." Order 10. We agree with the trial court and note that all property, whether acquired before or during the marriage, is included in the marital estate for property division. *Larkins*, 685 N.E.2d at 91.

¹⁶ Sturgis is the site of the Sturgis Motorcycle Rally.

¹⁷ After his mother's death, Husband established account #9119 and deposited the life insurance proceeds therein. At filing, the account contained \$247,335.00. Tr. 199.

¹⁸ At trial, Wife testified, "I work at Elwood Alternative School through the day. Three days a week I work at Marsh Supermarket here in Tipton. I work on Monday and Thursday evening as a GED assistant for the GED program and I run my own embroidery business on the side." *Id.* at 22. At the time of final hearing, Wife had been working at Marsh for approximately seven years, Elwood Alternative School and the GED program for approximately two years, and had been operating her embroidery business for approximately three years.

do not support the trial court's finding as to the third factor. Based upon the facts herein, the record lacks probative evidence or reasonable inferences to support the trial court's finding that Wife's economic circumstances would be secure at the time of the trial court's final disposition of the marital estate; thus, said finding is clearly erroneous. We remand to the trial court for further proceedings in dividing the marital estate consistent with (1) our finding as to the third factor, and with (2) the trial court's own finding, as to the first factor, that Wife's contributions as a homemaker were entitled to equal weight with Husband's contributions as a wage earner.

The fourth statutory factor contemplates the conduct of the parties during the marriage as related to the disposition or dissipation of their property. Here, the trial court concluded that "such conduct [was] not a relevant factor in this case" Order 19. We agree and conclude that the evidence supports the trial court's finding that neither party has dissipated marital assets.

As to the fifth and final statutory factor, the respective earning abilities of the parties, the trial court found that Wife was decidedly at a disadvantage given the fact that she had earned a beauty school certification more than thirty years earlier,¹⁹ was fifty-two years-old at the time of the final hearing, and was working four part-time jobs to earn approximately \$26,000 annually. Husband, in comparison, has consistently earned at least \$100,000 per year from the Tebbe farming operation for several years.

¹⁹ The record does not indicate that Wife had been employed as a beautician in the recent past.

Wife argues that “[w]hen all of the [statutory] factors . . . are considered, it is apparent the trial court, despite its assertion that it did, simply could not have weighed and considered all factors.” Wife’s Br. 27. We agree. Considering the foregoing, with more of the statutory factors favoring Wife than Husband, the evidence does not support the trial court’s conclusion pertaining to the parties’ earning abilities and economic circumstances, as reflected in the final division of the marital estate. The trial court’s finding regarding the third factor is clearly erroneous. Because the trial court’s decision is clearly against the logic and effect of the facts and circumstances before it, the division of the marital estate constitutes an abuse of discretion. We hereby remand for further consideration consistent with this opinion.

2. Systematic Exclusion of Gift and Inherited Assets

Wife contends that the trial court erred by systematically excluding from the marital pot, all property acquired by Husband through gift or inheritance – “either by awarding gifted or inherited property solely to Husband or by failing to include the value of the assets in its division.” Wife’s Br. 20.

In support of her position, Wife directs our attention to several illustrative cases addressing the treatment of gifts and inherited property in marital property division cases, including *Wallace*. 714 N.E.2d at 777. Wife contends that the facts in *Wallace* are much akin to the facts before us today. When the homemaker-wife, in *Wallace*, lost her job, she and her farmer-husband decided jointly that she should remain at home to raise the parties’ children and manage their household. The husband worked on his family’s farm, which was established by the husband’s great-grandfather, and which had been passed

down from generation to generation. In *Wallace*, as in the instant case, the husband's lineage was the source of much of the joint assets acquired during the marriage, and the bulk of the marital estate was comprised of assets in husband's family farming operation.

When wife, in *Wallace*, filed for dissolution of the marriage, she sought an equal division of the marital estate. However, the *Wallace* trial court awarded eighty-six percent of the marital estate to the husband and fourteen percent of the marital estate to the wife, setting aside the gifted and inherited assets solely due to the husband's lineage. The trial court based its division of the marital estate on the following factors: (1) the marital estate was largely comprised of farming assets "gifted" to or inherited by Husband; (2) the wife had not contributed to either the acquisition of the assets or to their increase in value; (3) the assets had not been under the wife's control or commingled with the parties' joint assets; and (4) the assets had been held solely in the husband's name and were part of a multi-generational gifting and inheriting plan aimed at ensuring that the assets continued to succeeding generations.

In essence, the *Wallace* trial court concluded that the husband had rebutted the presumptive equal division, and found that the farm assets "should be set off fully to [h]usband because of his acquisition of them through gifts and/or inheritances." *Id.* at 778 (emphasis added). On the wife's appeal, we reversed for abuse of discretion because the trial court considered only the gifted and inherited nature of the property in making its division.

Wife argues that the trial court made the same error here and abused its discretion by awarding to Husband all of the shares of Tebbe Farms, Inc. that had been acquired

during the marriage either by gift or inheritance. Wife also contends that the evidence does not support the trial court's finding and conclusion that Husband had rebutted the presumption of an equal division of the marital estate.

We do not agree with Wife's contention that the trial court systematically excluded from the marital pot all property acquired by Husband through gift or inheritance. To the contrary, we find that the trial court herein correctly noted that it could not "exclude from the marital estate the property brought into the marriage or acquired by gifts and/or inheritance, nor [could] such property be placed beyond the scope of this Court's authority for division." Order 15. The trial court also correctly recognized its option of awarding said property to Husband "if it finds the basis for doing so, as the terms of the division of the marital estate remain in the discretion of this Court." *Id.* (emphasis added). However, our review does not end here.

The evidence established that at the time of filing, the parties' marital estate contained eight hundred twenty (820) shares of A.G. Tebbe Farms, Inc. It is undisputed that two hundred ninety of these shares were purchased during the parties' marriage using \$400,442.00²⁰ in marital funds, and had a stipulated value of \$658,880.00 at filing. The trial court divided only the shares' appreciated value of \$258,438.00,²¹ giving each party

²⁰ Husband and Wife married on August 19, 1972. Although the two hundred ninety shares were purchased between December 29, 1995, and December 31, 2002, using income derived from Husband's work on the Tebbe farm during the course of the parties' marriage, Wife testified that she "had no idea [her] husband was making that kind of money" to be able to spend approximately \$57,000 a year on stock every year for seven years. Tr. 90. Also, there was testimony that the parties contributed all of their earnings which were supposedly deposited into a joint account to be used for household and children-related expenses.

²¹ Filing Value - Purchase Price = Increase in Value. (\$658,880.00 - \$400,441.74 = 258,438.00).

\$129,219.00; however, the trial court failed to award Wife any of the purchase value of the shares, despite the fact that they were bought, between 1995 and 2002, with marital funds.

Wife contends that during their marriage, and over the course of twenty-five years, Husband had either received by gift or had inherited the remaining five hundred thirty shares, incrementally. According to the parties' stipulation, the cost basis to the grantor(s) of these shares was \$545,950.00, and the shares had appreciated in value by \$658,210.00, amounting to a total value of \$1,204,160.00 at filing. In its distribution of the marital estate, the trial court awarded the entire \$1,204,160.00 sum to Husband solely because he had received them by gift or inheritance. Wife argues that this allocation was error.

Wife argues that all property, whether acquired before or during the marriage must be included in the marital estate for purposes of property division. *Larkins*, 685 N.E.2d at 91. It was undisputed that virtually all eight hundred twenty shares of Tebbe Farms, Inc. shares were acquired during the course of the parties' thirty-one year marriage. The irrefutable evidence established that Husband was able to devote as much time as he chose to making the farming operation a success due, in large part, to Wife's efforts in maintaining the parties' household, caring for their six young children, and working at various jobs outside the home to earn extra income for the family.

\$258,438.00 ÷ 2 = \$129,219.00.

At the final hearing, Wife testified that she “[did not] want any stock or land,” and agreed that “the Tebbe farm is the Tebbe farm and it should . . . [s]tay intact as much as possible.” Tr. 232. Nonetheless, she testified that she “[felt] that there [was] value there that need[ed] to be divided or considered” *Id.* at 85. On direct examination, Husband’s counsel asked Husband whether he was financially able to make a “substantial cash payment” to Wife in the event that the trial court so ordered. *Id.* at 181. Husband responded in the negative, saying that he could not pay the sum that Wife had requested because he had no liquid assets except \$355,692.00 in retirement funds. He explained,

The money, I mean the shares of stock are of value, yes, but they are not cash. I can’t just go to the bank and – I can’t force someone to buy them. I don’t know too many people that are going to want to come up and buy something that doesn’t pay a dividend or that they don’t have any control in and they weren’t meant to be done like that any how.

Id. 181-82.²² Husband also explained why he believed that a deviation from the presumptive equal division was warranted, saying

. . . I don’t think it would be fair to – to give her half of everything that my parents and my grandparents had given me and like I said I have offered to – everything that we have acquired during our marriage that I would split with her and she could have shares to give to our children and our retirement funds I would split with her.

Id. at 181.

²² Despite Husband’s testimony that he lacked funds with which to pay Wife a lump sum in a property settlement, we cannot overlook the fact that the Tebbe Farm documents provide that in the event that a sibling-owner opts to leave the business, the remaining sibling-owners retain the right of first purchase as regards the departing sibling-owner’s interest. A reasonable interpretation of that clause is that the business is divisible; therefore, although it might impose a financial strain on the business enterprise as a whole, a sibling-owner does have the option, whether he or she chooses to exercise it, to obtain the value of his interest in the business. Wife should not be denied any benefit to which she might be entitled through Husband’s business ownership, solely because it might create a financial strain on that business.

A trial court does not necessarily abuse its discretion by awarding to one party, gifted or inherited assets, as long as the Court has, first, taken those assets into consideration when dividing the marital estate, and, second, considered all of the relevant statutory factors in determining whether to deviate from the presumptive equal division of property. *Maxwell v. Maxwell*, 850 N.E.2d 969, 974 (Ind. Ct. App. 2006).

We do not substitute our judgment for that of the trial court; this we are not permitted to do. *Hatten*, 825 N.E.2d at 794. However, where we find an abuse of discretion, we must intervene to bring about a “just and reasonable” division. I.C. § 31-15-7-5. As we opined in *Wallace*,

[W]e cannot sanction the overall division of assets. Simply put, we discern no justification in the record for the wide disparity between the value of the marital pot awarded to [the husband] versus the values of the marital pot awarded to [the wife]. While the nature and source of the marital assets derived from [the husband’s] family may provide justification for some deviation from the statutory, presumptive equal division, they do not support a discrepancy of the magnitude that resulted here. In this regard, we note that [I.C. § 31-15-7-4(b)]²³ provides several options that the trial court may utilize upon remand in such a way as to provide a just and reasonable division of the marital assets between the parties, while at the same time awarding to [the husband] those assets which are closely connected with his family.

²³ Indiana Code section 31-15-7-4(b) provides,

- (b) The court shall divide the property in a just and reasonable manner by:
- (1) division of the property in kind;
 - (2) setting the property or parts of the property over to one (1) of the spouses and requiring either spouse to pay an amount, either in gross or in installments, that is just and proper;
 - (3) ordering the sale of the property under such conditions as the court prescribes and dividing the proceeds of the sale; or
 - (4) ordering the distribution of benefits described in I.C. § 31-9-2-98(b)(2) or I.C. § 31-9-2-98(b)(3) that are payable after the dissolution of marriage, by setting aside to either of the parties a percentage of those payments either by assignment or in kind at the time of receipt.

714 N.E.2d at 781 (emphasis added).

Here, we find that the evidence does not support the trial court's finding and judgment regarding its division of the marital property and hereby hold that the trial court abused its discretion when it weighed the statutory factors and deducted the five hundred thirty gifted and inherited shares of A.G. Tebbe Farms Inc. from the marital pot and gave them to Husband to arrive at the net value before dividing the assets. The parties' marriage lasted for thirty-one years. Husband worked on the family farm at his discretion and thereby, enjoyed the benefits of obtaining and holding farm assets due in large part to Wife's efforts in caring for the six children, working outside the home as well as on the farm, and maintaining the family's household. During the marriage, Husband and Wife jointly earned the monies that funded the purchase of the two hundred ninety additional shares of A.G. Tebbe Farms, Inc.²⁴ and likewise, both contributed to the overall success of Tebbe Farms, Inc. Furthermore, we cannot overlook the fact that it was over a twenty-five year period that Husband, incrementally, inherited or was gifted the additional five hundred thirty shares of A.G. Tebbe Farms, Inc.

After reviewing *Wallace* and the evidence herein, we cannot but conclude that the trial court erred when it deducted A.G. Tebbe Farms, Inc. assets in deciding to award those assets primarily to Husband based solely on the fact that Husband had received the bulk of these assets by gift or through inheritance. The trial court here – unlike the

²⁴ At the final hearing, Husband testified that he purchased the two hundred ninety shares using “[t]he money we received as a result of TLP IV, Inc. from the ground that we had farmed – from money from that entity.” Tr. 172.

Wallace court – actually discussed all of the five statutory factors; however, because the evidence does not support its findings, its judgment is likewise clearly erroneous.

Simply stated, of the four²⁵ relevant statutory factors that the trial court considered in its division of the marital estate, more inured to Wife’s benefit than to Husband’s. The evidence does not support the wide disparity between the parties’ respective awards. The parties’ marriage lasted for thirty-one years and produced six well-educated and apparently successful children. The trial court found that both parties’ joint efforts contributed significantly to the success of the family and the family farming operation. The evidence indicates that the marital assets, however acquired, were nurtured and maintained through the parties’ joint efforts, and the trial court’s division of the marital estate should evidence said collaboration. Because the trial court’s decision is against the logic and effect of the facts and circumstances before it, we find, as we did in *Wallace*, that the trial court has abused its discretion.

Thus, based upon the evidence, we find that Wife was entitled to share fully in both the purchase value as well as any increase in the value of the two hundred ninety shares that were purchased with marital assets. Also, she is similarly entitled to derive some benefit from the five hundred thirty shares that Husband received, incrementally over twenty-five years, by gift or inheritance during the parties’ thirty-one year marriage.

²⁵ The trial court concluded that the parties’ conduct during the marriage with regard to the disposition or dissipation of their property was “not a relevant factor in this case” Order 19. Therefore, the trial court only deemed the following factors to be relevant: (1) the income producing and non-income producing contributions of the parties; (2) the extent to which property was acquired by each spouse either before the marriage or through inheritance or gift; (3) the economic circumstances of the parties; and (4) the parties’ respective earning abilities.

As a result, we find that the evidence fails to support a discrepancy of such wide magnitude between the values allocated to Husband and to Wife in the division of the marital estate. Inasmuch as the trial court here based its decision to set over the gifted and inherited assets to Husband on its erroneous weighing of the statutory factors, such decision constituted reversible error. Accordingly, we hereby remand to the trial court for further proceedings consistent with our decision.

3. Deviation from Stipulation

Wife also argues that despite the fact that the trial court examined the parties' stipulation, approved and included it in the court's order, the trial court "failed to follow the stipulated values and rather, appointed alternative values for certain assets," and thus, "create[d] an enormous disparity in the breakdown of the marital estate." Wife's Br. 11-12. Specifically, Wife argues²⁶ that the trial court erred when it failed to include the stipulated values of certain accounts²⁷ on Husband's side of the ledger.

At filing, the bank accounts at issue had a combined stipulated value of \$261,223.00. By the time of final hearing, the accounts no longer existed. Wife insists that "[i]f, in fact, the trial court found that the accounts were either closed or depleted, the trial court should have assigned those values to the individual who closed or depleted the

²⁶ Wife also challenges the trial court's division of the A.G. Tebbe Farms, Inc. stock, which we have addressed at length above.

²⁷ The trial court found that that the following accounts were depleted or closed: National City Checking #4612; (National City Savings) Account #9119; First Farmer's Checking #0438; and National City Checking #4670.

account[s].” *Id.* at 12-13. She claims that the trial court employed “inconsistent” standards in its treatment of the parties’ conduct regarding their accounts. *Id.* at 13.

Before Wife filed for dissolution of marriage, she liquidated the parties’ First Farmers certificate of deposit valued at \$10,952.00. She argues that “because she received the benefit of those [certificate of deposit] funds,” the trial court assigned the \$10,952.00 value to her side of the ledger. Wife’s Br. 13. However, when Husband exhausted the funds in the accounts at issue, Wife argues that “[d]espite the fact that Husband received the benefit of the vast majority of those funds, the trial court did not include them on Husband’s side of the ledger; and further, did not divide them at all, but rather stated that they were either depleted or closed.” *Id.* at 12. She argues that this failure constitutes error. We disagree.

Wife concedes that she received the benefit of the value of the certificate of deposit. Husband, on the other hand, demonstrated to the trial court’s satisfaction that the accounts were depleted for the benefit of the parties’ children and for Wife. At filing, the parties’ accounts contained \$261,223.00. According to Husband’s Summary of Post Filing Expenses Paid From Account #9119, he paid post-filing expenses totaling \$339,743.61. These expenses included (1) family medical expenses [\$4,300.00]; (2) maintenance to Wife [\$43,226.00]; (3) contributions to the children’s Roth IRA accounts

\$18,000.00]; and (4) the children's school expenses [\$196,396.00]. *Id.* These expenses alone totaled \$261,922,²⁸ and exceeded the filing value of the accounts.

We have previously held that when dividing marital property, a trial court may, in its discretion, consider and/or credit a spouse for payments of marital obligations, temporary maintenance or other expenditures made during the pendency of the dissolution. *Ellis v. Ellis*, 730 N.E.2d 201, 204-205 (Ind. Ct. App. 2000). Accordingly, the evidence supports the trial court's finding that the accounts were closed or depleted for the benefit of the parties' children. We find no error from the trial court's decision not to place the account values on Husband's side of the ledger.

B. Award of Attorney Fees and Litigation Expenses

On his cross-appeal, Husband challenges the trial court's order that he pay Wife's attorney fees and reimburse her for litigation expenses. Given our findings and order of remand above, we find that once the gifted and inherited assets that were deducted by the trial court before arriving at the net value for division are considered and upon issuance of a more equitable division of those assets, consistent with our finding, each party will be financially able to pay his own attorney fees. Accordingly, we reverse the trial court's award of attorney fees and litigation expenses to Wife.

Reversed and remanded with instructions.

NAJAM, J., and FRIEDLANDER, J., concur.

²⁸ This sum (\$261,922.00) does not include those outlays for which Husband personally received benefit: (1) professional services [\$4,215.00]; (2) the purchase of his residence [\$67,133.00]; or (3) monies paid to/for the children (i.e. to purchase their cars) [\$48,273.61].